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IN AND BEFORE THE
FEDERAL ELECTION COMMISSION

On behalf of Respondents)
)
SurveyUSA and Fred Bierman) RE: Matter Under Review 5585
)

Response to Complaint

This is filed on behalf of SurveyUSA and Fred Bierman (collectively hereafter "Respondents") in response to a Complaint filed by complaining party, Americans for Fair Taxation ("AFFT"), a non-profit social welfare organization.

The Complaint alleges that Respondents (and others) were responsible for making certain public communications in violation of the Federal Election Campaign Act of 1971, as amended ("the Act"). Specifically, the Complaint alleges that Respondents (and others) violated the following specific provisions of the Act:

1. Failure to include a disclaimer in public communications identified in the Complaint. (2 USC § 441(d); 11 CFR §110.11)
2. Failure to register as a 'political committee'. (2 USC §431(4)(5)(6); 11 CFR §100.5)
3. Conspiracy to violate the Act (2 USC §441(d) and 2 USC §431(4)(5)(6))

Complaint Must Be Dismissed Against Respondents

Respondents hereby move the Commission to dismiss the Complaint against Respondents SurveyUSA and Fred Bierman for the reason that there are no facts to support the Complaint against them and because Respondents have not violated any provision(s) of the Act.

I. There are no facts to support the Complaint against Respondents

Attached as Exhibit A to this Response is the Affidavit of Respondents SurveyUSA and Fred Bierman, President of SurveyUSA. The inclusion of Respondents in this MUR is clearly a case of mistaken identity, apparently because of the similarity of the Respondent's name ("SurveyUSA") and the purported sponsor of the telephone calls at issue in the Complaint ("USA Public Opinion Group"). There is no evidence offered by Complainant linking SurveyUSA to the facts of this Complaint. The only conceivable reason SurveyUSA was named

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as a Respondent was because its corporate name includes “USA” and it is a public opinion research company. That is clearly insufficient evidence to warrant continued inclusion of Respondents in this enforcement proceeding.

Respondents hereby submit to the Commission their sworn testimony in the form of the attached Affidavit which states *under penalty of perjury* that they did not conduct the phone calls described in the Complaint nor have Respondents been retained by any other named parties for any purpose related in any way to the type of communications at issue in the Complaint. See Exhibit A, Affidavit of Respondents.

Conversely, Complainants offer nothing to tie Respondents to these communications other than a script containing the name of some entity ‘similar’ to Respondents’ company name – but not even Respondents’ name. After being informed of their mistake in assuming (based on no facts presented in the Complaint) that Respondents were somehow associated with the phone calls at issue, AFFT nonetheless refused to dismiss SurveyUSA from its Complaint.

In fact, Complainant describes the offending “USA Public Opinion Group” as follows in the text of the Complaint:

“6. Respondent USA Public Opinion Group, location unknown, status unknown...”

Complainants obviously have no information or facts to link Respondents in any way to the alleged illegal phone calls and none exist.

Ironically, there is *only* one relationship between Respondents and any of the congressional districts identified in the complaint. Exhibit 10 attached to Complaint is a news article referencing the phone calls at issue herein some of which were apparently made in the congressional district of Mike Fitzpatrick, the Republican candidate for the US House of Representatives in the 8th congressional district of Pennsylvania. The relationship between candidate Fitzpatrick and Respondents was a contract with a subsidiary of Respondents to deliver ‘get out the vote’ (“GOTV”) phone calls in *support* of Fitzpatrick. See Exhibit A, Affidavit of Respondents. Certainly, Respondents would not – and did not – engage in making communications against one of its own clients. A copy of the script of the pre-recorded GOTV calls in the 8th congressional district of Pennsylvania is attached hereto as Exhibit B.

Accordingly, Respondents submit to the Commission that the facts of the Complaint do not apply to them and that Complainants’ inclusion of these Respondents was/is a case of

mistaken identity. Respondents have no further knowledge about any of the allegations in the Complaint because Respondents have not engaged in any of the activities contained therein.

II. Respondents have not violated or conspired to violate the Act.

The Complaint fails to demonstrate a violation of law by Respondents.

1. In telephone calls made by Respondents and paid for by a political committee, as in the case of the GOTV calls paid for by Mike Fitzpatrick's principal authorized committee, Respondents do (and did) include the appropriate disclaimer as required by 11 C.F.R. §110.11(a)(2). See Exhibit B.

2. Neither Respondent is a 'political committee', as defined in the Act. 2 U.S.C. §431(4) and 11 C.F.R. §100.5.¹ An entity is only a "political committee" if it receives "contributions" or makes "expenditures" in excess of \$1,000. FEC v. Malenick, 310 F. Supp.2d 230, 237 (D.D.C. 2004). Respondent SurveyUSA is a commercial vendor retained by media entities for survey research services. Respondent Fred Bierman is an individual and President of SurveyUSA.

Contrary to the assertions in the Complaint, neither Respondent received 'contributions' as defined in 2 USC §431(8)(A)(i): "The term "contribution" includes any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office...". Respondents *only* provide 'goods or services' at a 'usual and normal price' to third parties, which could (but did not) include any political candidates or committees named as Respondents in the Complaint. 11 CFR §100.52(d)(1)(2); compare Malenick, 310 F.Supp.2d at 234-37. The mere fact that Respondent Survey USA charged the normal price for services it provided precludes a finding that it is a "political committee." Moreover, Complainant has not alleged and there are no facts to suggest that Respondents provided goods or services to *any* customer or entity at anything other than the usual and normal price charged by Respondents for its services.

Similarly, Respondents have made no 'expenditures' as defined in 2 USC §431(9)(A) and 441b(b)(2). Expenditures mirror the definition of 'contributions' under the Act and in the Commission's regulations: "...the provision of goods or services without charge or at a charge

¹ SurveyUSA's subsidiary Voter Roll Call, which made GOTV calls on behalf of the Fitzpatrick campaign, is likewise not a 'political committee' as defined by the Act.

that is less than the usual and normal charge for the goods or services is an expenditure'. 11 CFR §100.111(e)(1); FEC v. GOPAC, Inc., 871 F.Supp. 1466, 1469 (D.D.C. 1994). Again, Complainant does not and cannot cite to any instance(s) or fact(s) in support of an allegation that Respondents made 'expenditures' for or on behalf of any candidate or political committee identified in the Complaint nor can Complainant provide facts to demonstrate that Respondents provided any services for 'less than the usual and normal charges'.

Had Respondents provided goods or services to any of the other named Respondents in the MUR (which they did not), Respondents would nonetheless come within the parameters of the Commission's definition of '*commercial vendor*' which "...means any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services." 11 CFR §116.1(c). Absent a showing that Respondents provided goods or services to a political committee at a discounted rate below the usual and normal amounts charged to non-political entities, there is no 'contribution' or 'expenditure' as defined in the Act.

Complainant has alleged no facts (and none exist) to support a finding that Respondents should have registered as a political committee as required by 11 CFR §100.5. Respondents neither 'received contributions' nor 'made expenditures' in excess of \$1,000 and triggered no filing or registration requirements related to political committees under the Act.


3. Respondents violated no provisions of the Act and did not participate in a conspiracy to violate the provisions of the Act. Complainant cites no authority in the Act for its claimed existence of a legal principle of 'conspiracy to violate the Act' as a separate violation of law. Unlike in a civil suit for a RICO violation, there is no statutorily authorized cause of action for "conspiracy" within the Act. See Beck v. Prupis, 529 U.S. 494, 500 (2000). Even if a court were to recognize such a cause of action, in order to find a "civil conspiracy," common law principles require (1) two or more persons acting with a common purpose to do an unlawful act; (2) an overt act done in furtherance of the common purpose; and (3) actual legal damage. Kline v. Security Guards, Inc., 386 F.3d 246, 262 (3rd Cir. 2004). Additionally, the overt act itself must be illegal or tortuous and cause the legal damage. Beck, 529 U.S. at 504. The Complaint, however, fails to identify any overt illegal action connected to these Respondents that caused AFFT legal damage.

Respondents, having engaged in none of the actions alleged in the Complaint, have committed no violation of the Act or other applicable law, and submit that the entire Complaint must be dismissed against them.

CONCLUSION

For the reasons stated herein and because Respondents SurveyUSA and Fred Bierman have demonstrated that no action should be taken on the Complaint pursuant to 11 CFR 111.6, Respondents respectfully move the Commission to dismiss MUR 5585 against these Respondents. There can be no other recommendation to the Commission other than a finding that there is no reason to believe that Respondents have violated the Act. 11 CFR §111.7.

Respectfully submitted,



Cleta Mitchell, Esq
Foley & Lardner LLP
3000 K Street, NW
Washington, D.C. 20005
(202) 295-4081
(202) 672-5399 (fax)
Counsel for Respondents
SurveyUSA and Fred Bierman

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Affidavit of Fred R. Bierman & SurveyUSA

ss:

State of California)
 County of Los Angeles)

I, Fred R. Bierman, do hereby affirm and state under penalty of perjury as follows:

1. I am a named Respondent identified in a complaint filed with the Federal Election Commission ("the Complaint") and designated as Matter Under Review 5585 ("the MUR").
2. I am the President of SurveyUSA, another named Respondent in the Complaint, and have served in that capacity since September, 1992. I have knowledge of all engagements undertaken by and clients of SurveyUSA and, in particular, during calendar year 2004.
3. SurveyUSA is a public opinion polling firm which conducts news and election research for the news departments of approximately 50 television stations in cities across the U.S. SurveyUSA is the dba for parent company Hypotenuse, Inc., a privately held Delaware S-corporation incorporated 1990, based in Verona, New Jersey, with offices in Encino, California. I own the corporation with Jay H. Leve.
4. The allegations contained in the Complaint filed by the complaining party, Americans for Fair Taxation ("Complainant"), are wholly erroneous as applied to the above-named Respondents, namely, SurveyUSA and myself.
5. Neither SurveyUSA nor I as an individual acting in any capacity whatsoever conducted telephone bank public communications of the type described in the Complaint in any geographic location before, during or after the 2004 general election cycle or at any time whatsoever.
6. Neither SurveyUSA nor I as an individual acting in any capacity whatsoever have, at any time, conducted any type of telephone communications using the script described in the Complaint or any similar script.
7. Neither SurveyUSA nor I as an individual acting in any capacity whatsoever were retained by any person, committee or entity in 2004 (or at any other time) to conduct telephone communications similar in any way to the communications described in the Complaint.
8. SurveyUSA opinion polls are genuine research surveys conducted on behalf of the news departments of one or more television stations which are identified at the beginning of each poll, for broadcast on these stations' newscasts. At no time are partisan messages ever disguised as "push" polls.
9. Hypotenuse also maintains as a business unit that is entirely separate from its polling unit, a message delivery service branded Voter Roll•Call, which is sometimes used to deliver Get Out The Vote ("GOTV") calls prior to elections. Voter Roll•Call delivered GOTV calls prior to the

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2004 Election. Every such call was a non-interactive message which asked no questions and solicited no responses from individuals called. Every such message included the FEC mandated disclaimer notice identifying who paid for the message. No such message contained language in any way similar to language used to conduct opinion polls.

10. Mike Fitzpatrick was a Republican candidate for the US House of Representatives for the 8th congressional district of Pennsylvania and is identified in the Complaint as one of the candidates who was a subject of the allegedly illegal telephone communications at issue in the MUR.

11. Voter Roll•Call was engaged by a Pennsylvania firm, Hallowell & Branstetter, that was working for the Mike Fitzpatrick for Congress campaign, to conduct GOTV message delivery calls for the Fitzpatrick campaign; thus, the Fitzpatrick campaign was a client of Voter Roll•Call.

12. The GOTV calls delivered by SurveyUSA for the Fitzpatrick campaign were the only involvement by SurveyUSA with or regarding any of the candidates or campaigns identified in the Complaint.

13. The GOTV calls delivered by SurveyUSA for the Fitzpatrick campaign were not of the type or similar in any way to the communications described in the Complaint.

14. Neither SurveyUSA nor Voter Roll•Call nor I as an individual acting in any capacity whatsoever were nor would we ever be involved in any manner in making communications through any medium that were or could be deemed detrimental to our client, the Mike Fitzpatrick for Congress Campaign, such as those described in the Complaint.

15. Exhibit 1 of the Complaint is a compact disc with an audio recording of a "push poll" delivered by a company identifying itself as "USA Public Opinion Group" and named in the Complaint. SurveyUSA is not the same company as and has no connection to USA Public Opinion Group and had nothing to do with the audio communication included in the Complaint.


16. Neither SurveyUSA nor I as an individual acting in any capacity whatsoever were aware of the telephone communications referenced in the Complaint prior to a reading a press release generated on October 25, 2004 by FairTax.org and carried on U.S. Newswire. SurveyUSA routinely monitors the internet for news stories and press releases which mention SurveyUSA or its clients.


17. On or about October 26 , 2004, after becoming aware of the above-referenced press release regarding the Complaint and the allegations involving SurveyUSA, I contacted James V. Lacy, the attorney for Complainant Americans for Fair Taxation and advised him that this appeared to be a case of mistaken identity and that SurveyUSA had not engaged at any time whatsoever in the type of communications alleged in the Complaint.

18. I requested that SurveyUSA not be included in the Complaint for the reasons stated above but the request was ignored.

19. There is no factual basis whatsoever for including SurveyUSA or me in the MUR because SurveyUSA has not made any telephone or other communications of the type described in the Complaint or has in any way engaged in the conduct or scenarios described in the Complaint.


Further Affiant Sayeth Not.


Fred R. Bierman, individually


Fred R. Bierman, President
Survey USA

Before me appeared this 15th day of December, 2004, Fred R. Bierman, in his individual capacity and also as President of SurveyUSA and affirmed under penalty of perjury that the above and foregoing statements are true and correct.

SEAL


Notary Public

My Commission Expires: 9/14/2005



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Voter Roll Call Script for Mike Fitzpatrick for Congress Campaign
Calls made 10/26/04

Announcer: "These are dangerous times. Ginny Schrader believes the Patriot Act, which we use to bring terrorists to justice, was one of the worst pieces of legislation ever passed. The Patriot Act passed Congress with overwhelming support from both parties. The Patriot Act gives law enforcement officers the tools they need to keep our country safe. Schrader just has no experience keeping us safe."

Mike Fitzpatrick: "I'm Mike Fitzpatrick and I approved this message."

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